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Supreme Court of the United States

OCTOBER TERM, 1958

No. 497

ROBERT LEE KORTE, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

ROBERT LEE KORTE, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition, *infra*, pages 15-22.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. (See Appendix B to this petition for writ of certiorari, *infra*, page 23.) The time for filing this petition for writ of certiorari expires November 12, 1958. This petition for writ of certiorari is filed within time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.) The district court had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Whether Section 6(m) of the Universal Military Training and Service Act (50 U. S. C. App. § 456(m)) prohibits service under the Act by a person convicted of a felony, making void the order commanding petitioner to perform civilian work as a conscientious objector in lieu of induction into the armed forces because of his conviction of a felony.

STATUTES AND REGULATIONS INVOLVED

Section 6(m) of The Universal Military Training and Service Act, as amended (50 U. S. C. App. § 456(m)): Moral Standards.

> "No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Selective Service Regulation § 1622.44: Class IV-F: Physically, Mentally, or Morally Unfit.

> "In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces: (b) who, under the procedures and standards prescribed by the Secretary

of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation."

Selective Service Regulation § 1628.10: Who Will Be Examined.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 3: Functions of Induction Stations.

"The primary functions of induction stations are to—

a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10d: Moral Standards (except as provided in par. 27e.).

"Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b. More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47)."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10d(1).

"A registrant who has been convicted by a civil court, or who has a record of ajudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . .".

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10e: Individuals ineligible for induction.

"Individuals listed below are ineligible for induction."

Administrative Disqualifications.

(1)(c) "Registrants who fail to meet the prescribed moral standards indicated in d. above."

Department of the Army-Special Regulations, approved 10 April 1953, SR615-180-1, par. 14: Preparation and processing of records.

"b. DD Form 47. (1) Purpose.—DD Form 47 is the official form for recording the results of the administrative records examination during the registrant's preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System."

STATEMENT OF THE CASE

The Facts

Petitioner was charged by indictment, which alleged he did "on or about the 26th day of November, 1956, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class 1-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto." [R. 4][1] Petitioner pleaded not guilty and waived the right of trial by jury. [R. 5]

The case proceeded to trial on June 3, 1957. [R. 9] The entire draft board file was received into evidence as Government's Exhibit No. 1. [R. 9] It was stipulated that the petitioner failed to report to his local board, as ordered on November 26, 1956. [R. 10] Pertinent parts of the draft board file were read into the evidence. [R. 11-34] Petitioner testified in his own behalf. [R. 40-55]

[1] Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

Petitioner registered with his local board on March 28, 1951, and on December 22, 1951, filed his classification questionnaire. (F. 6)[2] He showed that he was a student at the University of California. (F. 11) He certified that he was a conscientious objector. He filed a conscientious objector form on April 21, 1952. (F. 12, 252-254) He was classified I-A by his local board and appealed to the appeal board. (F. 13) His case was referred to the Department of Justice for investigation. (F. 228) Following a hearing in the Department of Justice a recommendation was made to the appeal board resulting in a I-A classification. (F. 5, 228-230, 239)

When ordered to report for induction he refused to submit to induction on April 28, 1953. (F. 217-224, 238) He was indicted on May 13, 1953. (F. 212) He pleaded not guilty on June 17, 1953. (F. 211) On July 3, 1953, he was convicted of a felony and sentenced to the custody of the Attorney General for a period of 18 months. (F. 208-209) [R. 9-10, 14-15, 23, 40-41, 46, 49] On August 3, 1953, the petitioner commenced serving his time in the custody of the Attorney General pursuant to the judgment of conviction. (F. 206-207) [R. 46]

Petitioner was released from the custody of the Attorney General on March 24, 1954, and stayed on parole until February 2, 1955. [R. 46] During this period of time he was classified IV-F on September 11, 1953. [R. 13, 15] (F. 200)

Two days after the date of expiration of petitioner's parole the local board on February 4, 1955, classified him I-A. (F. 13) [R. 15-16] On February 11, 1955, a special form for conscientious objector (Form No. 150) was mailed to the petitioner, requiring him to give additional information. (F. 14, 189) The petitioner filled out the conscientious objector form and showed the same information as before except he added that he had been arrested, convicted and sent to

[2] Numbers preceded by "F." appearing in *parentheses* herein refer to the pages of the draft board file (Government's Exhibit 1). Such page numbers, written in longhand, appear at the top of each page of the file.

the federal prison because of his stand as one of Jehovah's Witnesses against military service. (F. 186, 191-194) He filed additional information showing his ministerial activity and corroborating his claim for classification as a minister of religion. (F. 154-185) He filed a special claim for classification as a minister. (F. 143-153) This was accompanied by statements corroborating his ministerial activity. (F. 137-142) He also filed information answering a special questionnaire about his religious affiliation and activity. (F. 125-135)

The local board on April 1, 1955, classified him 1-A. (F. 114) Petitioner appealed to the appeal board. (F. 14, 124) His case was referred to the Department of Justice. The investigation by the FBI and the recommendation of the Department of Justice showed the petitioner's sincerity as a conscientious objector, as well as his having been convicted of a felony and serving 18 months in prison. (F. 56-80, 112-121) [R. 23, 25-26]

While the petitioner's case was pending before the appeal board he was on August 30, 1955, ordered to take a physical examination on September 9, 1955. (F. 99) He took the physical examination and was found acceptable, and in addition the armed forces examiner stamped upon the order an army waiver of the petitioner's prior conviction for a felony. (F. 83-96) On December 20, 1955, the petitioner was notified of his physical acceptability for military service. (F. 14) [R. 21] The Department of Justice on September 29, 1956, recommended to the appeal board that the petitioner be classified as a conscientious objector. (F. 56-80) The appeal board on July 20, 1956, classified the petitioner I-O. (F. 4)

The petitioner refused to designate a type of civilian work that he wanted to do as a conscientious objector pursuant to the request of the local board. (F. 43-44) The local board then offered petitioner three types of civilian work to choose from but he refused to do this. (F. 38-40) The petitioner was requested to appear before the local board for a

special hearing with a representative of the state headquarters in an effort to reach an agreement as to the type of work he would be willing to accept as a conscientious objector. (F. 14, 28, 31) The petitioner stated his reasons for refusal to do civilian work. (F. 26-27) The Director of Selective Service approved the issuance of an order commanding the petitioner to do civilian work. (F. 24) The local board ordered the petitioner to report to Los Angeles County Department of Charities to do civilian work on November 28, 1956. (F. 14, 20) The petitioner failed to report to the local board. (F. 14, 20) [R. 10]

Form and History of Action Showing Jurisdiction in the District Court

The indictment charged petitioner with a violation of the Universal Military Training and Service Act. It was alleged that after petitioner registered and was classified he was ordered to report for civilian work. It was further alleged in the indictment that the petitioner did "knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto." [R. 4]

Petitioner pleaded not guilty and waived the right of trial by jury. [R. 5-6] Evidence was received. [R. 9-69] A motion for judgment of acquittal was made. [R. 35-39] It was renewed at the close of all of the evidence. [R. 56-60] The court overruled the motion and found the petitioner guilty as charged in the indictment. [R. 65-66] Petitioner was sentenced to serve nine months in the custody of the Attorney General. [R. 6-7] His notice of appeal to the Court of Appeals was timely filed. [R. 6-8] The Court of

Appeals affirmed the judgment of the district court on October 13, 1958.

REASON FOR GRANTING THE WRIT

Section 6(m) of the Act (50 U. S. C. App. § 456(m)) in the proviso clause thereof relieves from "training and service" any person who has been convicted of a felony. The undisputed evidence in this case shows that the petitioner was previously convicted of a felony in the United States District Court for the Northern District of California, Southern Division, on July 3, 1953, and sentenced to serve a term of 18 months in the custody of the Attorney General on July 14, 1953. (F. 209) [R. 14-16, 23, 46]

Section 1622.44 of the Selective Service Regulations (32 C. F. R. § 1622.44) and Department of the Army Special Regulation of April 10, 1953 (SR 615-180-1, par. 10d(1)), which provides for the waiver of disqualification because of conviction of a felony, are inconsistent with Section 6(m) of the Universal Military Training and Service Act, which provides that a person convicted of a felony shall not be eligible for service in the armed forces. These regulations are based upon the Selective Training and Service Act of 1940 (50 U. S. C. App. §§ 301-318), which provides differently from the present Act. The 1940 law said that no felon should be excused from duty "by reason solely of such conviction." (56 Stat. 1018; see House Report 2574, 77th Cong., 2d Sess., Oct. 17, 1942, at page 8275, quoted in the opinion of the Court of Appeals, *infra*, page 21.) The 1940 law was passed at a time when the country was in a far greater emergency than it was in at the time of the enactment of the present Universal Military Training and Service Act. The present emergency was not deemed to be as great as that which existed at the time of the passage of the 1940 law. Under the 1940 law, however, men were inducted up to the age of 40. The present Act deals mainly with youths from the ages of 18 to 26. The

present Act by Congress intended to protect the moral welfare of youths inducted into the armed forces and because of that the present Act expressly excluded persons convicted of a felony from service. This exclusion was for the purpose of preserving the morale and the moral welfare of the youths inducted into service.

Congress did not consider the emergency that presently exists to justify the impressment of felons into the service. Congress intended to preserve the morals of the youths in the armed forces by keeping them from association in training and service with persons of felony records. The use of the word "except" in Section 6(m) of the Act (50 U. S. C. App. § 456(m)) shows the intent of Congress that felons be excluded from service in the armed forces.

The armed forces waiver of the moral disqualification because of conviction appearing in the draft board file and dated September 9, 1955, (F. 83-96) was not basis in fact for the I-O classification of July 20, 1956, by the appeal board (F. 4) Section 1622.44(b) of the Regulations (32 C. F. R. § 1622.44(b)) deals with persons who are found to be "morally unacceptable for any service in the armed forces" by the Secretary of Defense. Subdivision (b) of Section 1622.44 of the Regulation (32 C. F. R. § 1622.44) does not deal with convictions of felonies but relates only to morals and other felony convictions. Subdivision (c) of the Regulation deals with persons who are convicted of felonies. However, it goes on to add that the person must also not be "eligible for classification into a class available for service." This particular addition to the language appearing in the Act (50 U. S. C. App. § 456(m)) is ambiguous. If the Regulation be construed that a person who has been convicted of a felony to be eligible to the IV-F classification must also be otherwise not eligible for classification for service, then it is in conflict with the statute and of no force and effect and it cannot be used as a basis for a denial of the IV-F classification.

The armed forces waiver prescribed by subdivision (b)

is not equivalent to a denial of the rights prescribed by the Act (50 U. S. C. App. § 456(m)) to a IV-F classification since the statute disqualifies a person who has been convicted of a felony. If it be contended that the armed forces waiver of disqualification constitutes a waiver of conviction then the petitioner takes the position that such waiver, subsection (b) of the Regulation and the regulations of the armed forces prescribed by the Secretary of Defense to that effect are void.

A reasonable interpretation to be made of the Regulation (32 C. F. R. § 1622.44(b)) prescribing the power of the Secretary of Defense to accept persons otherwise morally unfit is that subdivision (b) of the Regulation does not relate to persons convicted of felonies. It is confined to persons otherwise not morally acceptable to the armed forces.

In the event that the Regulation is construed otherwise so as to authorize the Secretary of Defense to find persons convicted of felonies morally acceptable and thus make such acceptance basis in fact for the denial of the IV-F classification, then the Regulation is in conflict with the Act (50 U. S. C. App. § 456(m)) or ultra vires, thus making the classification based upon such action arbitrary and capricious and constituting no basis in fact for the denial of the IV-F classification.

In the event that it is argued that subdivision (c) of the Regulation (32 C. F. R. § 1622.44(c)) prescribing the disqualification of a person convicted of a felony by making it contingent upon such person's being otherwise ineligible for service, then such construction makes the Regulation ultra vires. It constitutes, therefore, an illegal amendment by the Regulation (32 C. F. R. § 1622.44) of an Act of Congress (50 U. S. C. App. § 456 (m)) in violation of the law. —*Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954).

A more reasonable interpretation of such ambiguous regulation is that a person who has been convicteid of a felony is not eligible for classification for service. This reasonable interpretation of that subdivision of the Regulation in

order to avoid bringing the Regulation in conflict with the statute and being void must be accepted by the Court. Where a regulation can be given a reasonable interpretation so as to avoid a declaration of its invalidity it should be thus interpreted.

This interpretation commanded by the law to avoid a declaration of invalidity means that the word "who" following the word "and" and preceding the words "is not eligible" appearing in subdivision (c) of Section 1622.44 of the Regulation is mere surplusage. In the event that the Court does not accept this interpretation but construes the Regulation so as to authorize a holding that there was basis in fact for the denial of the IV-F classification then the petitioner says that such Regulation is void because it is in conflict with the Act (50 U. S. C. App. § 456(m)) disqualifying from service all persons who have been convicted of a felony.

It may also be argued by the Government that because the petitioner did not file a formal claim for the IV-F classification or an appeal statement claiming the IV-F classification but, on the contrary, at all times insisted that he should be classified as a minister constitutes a waiver of his right to challenge the appeal board classification for a failure to give him the IV-F classification. In the event such argument is advanced it will be contrary to the holding of the court below in *Cox* v. *Wedemeyer*, 192 F. 2d 920 (9th Cir. 1951). In that case the court, *inter alia*, said: "We think that the meaning of these regulations was that the board of appeal was required to classify the registrant de novo on the basis of his whole Selective Service Record." See also *Franks* v. *United States*, 216 F. 2d 266 at pages 269-270 (9th Cir. 1954); *Pine* v. *United States*, 212 F. 2d 93 at page 98 (4th Cir. 1954); *United States* v. *Pitt*, 144 F. 2d 169, 172 (3rd Cir. 1944).

Section 1626.26 (a) of the Regulations (32 C. F. R. § 1626.26(a)) provides that the appeal board shall classify

the registrant "in the same manner in which a local board gives consideration thereto when it classifies a registrant." Section 1626.26(a) provides that the registrant shall not be placed in Class IV-F because of physical or mental disability unless the local board has so classified the registrant. This limitation does not extend to persons convicted of a felony and it does not prevent the appeal board from classifying a felon in Class IV-F, as required by the Act (50 U. S. C. App. § 456(m)) and Section 1622.44 of the Regulations. Section 1626.26(a) is restricted to physical and mental disability and does not extend to moral disqualifications or convictions of felonies. In the event such Regulation (32 C. F. R. § 1626.26(a)) is construed so as to reach persons convicted of a felony then the petitioner says that such Regulation is void because it is in conflict with the Act (50 U. S. C. App. § 456(m)) for the reasons above stated.

It is submitted that the problem here presented is one of great public importance that is sufficient to justify the granting of the writ of certiorari. There are hundreds of thousands of young men that are in the service by reason of induction prescribed by the Act. The question of whether it was the intent of Congress to protect this large army of youths from association with felons is a highly important one. It is not the interests or welfare of people convicted of felonies that is important. The importance of this case is that it involves a matter of national policy that affects the life and welfare of a large segment of the youthful people of the United States. The emergency that now exists is not as great as that which existed in 1940 and during World War II. Consequently the reasons that impelled Congress to write the law differently from the 1940 law are important and sufficient to justify the consideration by this Court commanding a review of this problem and a resolution of it by decision of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is submitted that the Court ought to grant the petition for writ of certiorari and take this case in for a review of the judgment of the court below.

Respectfully submitted,

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November, 1958.

APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert Lee Korte,

Appellant,

vs.

United States of America,

Appellee.

No. 15,673

Oct. 13, 1958

Appeal from the United States District Court for the Northern District of California Southern Division

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Before: FEE and CHAMBERS, Circuit Judges, and JAMES M. CARTER, District Judge

CARTER, James M., District Judge.

This appeal presents the sole question as to whether a Selective Service registrant who has been previously convicted of a felony, is entitled to a classification in IV-F and exemption from service.

Korte, the appellant, was previously convicted in 1953 of a violation of the Universal Military Training and Service Act of 1948, hereinafter referred to as the Act, and was sentenced on July 3, 1953, to the custody of the Attorney General for a period of eighteen months. This violation of the Act, constituted a felony, Sec. 12(a) of the Act, [50

USCA, App. Sec. 462(a)]. He was released on parole on March 24, 1954. His parole expired about February 2, 1955. On September 11, 1953, following his incarceration he was classified in IV-F and remained in such classification during his imprisonment and parole.

Immediately following the termination of his parole, Korte was reclassified I-A by his local board. He filed a claim with the board asserting the classification of a minister, IV-D, based on his membership in a religious group known as Jehovah's Witnesses.

The claim for change of classification was denied and the appellant took his claim before the Appeal Board, continuing to seek classification as a minister. Pending the Appeal Board's action, Korte was ordered to take a physical examination for induction and passed the same. An Army waiver of the appellant's prior conviction of a felony was executed and the appellant was found acceptable for service. Subsequent to the execution of the waiver, the Appeal Board reclassified the appellant I-O, the classification for conscientious objectors.

The local board then offered the appellant three types of civilian work that would contribute to the maintenance of the national health, safety or interest in lieu of service in the armed forces. Korte refused to accept any of the jobs offered. The board then ordered Korte to report for work with the Los Angeles Department of Charities on November 28, 1956. Having failed to report on that date, appellant was indicted, tried and convicted. This appeal followed.

At no time did appellant contend to the local or appeal boards that he should have been classified as IV-F. During the trial, appellant made motions for acquittal at the conclusion of the government's case and again at the close of all the evidence. Both motions were denied.

Two principal questions were raised on this appeal. *First*, whether a person convicted of a felony is ineligible for induction into service under the Act, and hence entitled to a classification of IV-F and exemption from service; and

Second, whether the appeal board is required to consider classifications in a particular order, that is from the lowest class comprised of those least eligible for service, to the highest class comprised of those who are most eligible for service. At the argument on the appeal, appellant's counsel withdrew from consideration and abandoned this latter contention. Actually it is included in the first point, the contention being that the board overlooked and failed to consider the IV-F classification, one lower in order than the I-O classification given the appellant. No point is raised on appeal as to appellant's claim before the local board to be classified IV-D as a minister.

Section 6(m) of the Act, [50 USCA, Sec. 456(m)] reads:

> "No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Section 1622.44 of the Selective Service Regulations, [32 Code of Fed. Reg. Sec. 1622.44], describing Class IV-F, reads:

> "In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification, into a class available for service; or (d) . . .".

Section 4(a) of the Act, [50 USCA, App. 454(a)] provides in part as follows:

> "No person shall be inducted into the Armed Forces for training and service or shall be inducted for

> training in the National Security Training Corps under this title until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense. . . ."

Section 10(c) of the Act, [50 USCA, Sec. 460(c)] provides that the President may "delegate any authority vested in him under this title and (to) provide for the sub-delegation of any such authority."

Section 1628.10 of the Regulations [32 Code of Fed. Reg., Sec. 1628.10] provides:

> "Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, . . ."

Pursuant to legislative mandate, Department of the Army, Special Regulations were approved April 10, 1953, SR 615-180-1. Thereunder induction stations were set up to conduct the examinations as to physical, mental and moral standards.

Paragraph 10(d) of Army Regulations, provides, "Information concerning court convictions of registrant and whether he is in custody of the law will be indicated on DD Form 47 . . . If a waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47)."

Paragraph 10d(1) of the Army Regulations reads as follows:

> "A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed

> Forces unless such disqualification is waived by the respective department . . .".

Pursuant to these regulations and after the examination provided for, the army may or may not grant a waiver of the conviction of a felony. In this case the waiver was granted.

Appellant contends that Section 6(m) of the Act, [50 USCA, App. Sec. 456(m)] is to be interpreted as a *congressional mandate* that all persons convicted of a felony are to be relieved from training and service under the Act.

"No person has a constitutional right to be free from a call to military service" but Congress may, in its discretion, provide "complete exemption from service for some people and partial exemption for others." *United States v. Palmer,* [3 Cir. 1955] 223 F.2d 893, 896.

It is well settled that "exemption from military service is a matter of legislative grace and not a matter of right. No one has an inherent or constitutional right of exemption. The registrant must fit himself within the exemptions provided by Congress," *United States v. Pomorski,* [W.D. Mich. 1954] 125 F.Supp. 68, 71. *United States v. Schwimmer,* 279 U.S. 644, 49 S. Ct. 448, 73 L.Ed. 889; *United States v. Macintosh,* 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302; *United States v. Brooks,* [2 Cir. 1945] 147 F.2d 134, cert. den. 324 U.S. 878.

Turning to the Selective Service Act we find at least two aids to the construction of Sec. 6(m). First, an examination of the Act leaves no doubt that those classes of citizens entitled to exemption from service have been clearly, precisely and *affirmatively* set forth in the Act in the various subdivisions of Sec. 6. Nowhere in the Act is a class given exemption by way of an *exception.* This indicates that it was the intent of Congress to spell out those classes who were to be exempt by positive *direction* and not by *exception.*

Second, Section 10(7) of the Act, [50 USCA, App. Sec. 460(7)] authorizes the President to "prescribe eligibility, rules and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title". (Sections 451-454 and 455-471 of 50 USCA, App.) "of any person convicted of a violation of any of the provisions of this title."

A conviction of any of the provisions of the Act constitutes a felony. Sec. 12(a) [50 USCA, App. Sec. 462(a)]. If section 6(m) is to be construed as a *mandatory* direction to exempt felons from service, then section 10(7) would be in direct conflict with it. On the other hand if section 6(m) is to be construed as being *permissive* then no conflict exists.

In cases of seeming conflict in the provisions of a statute, the construction which would permit both provisions to stand should be employed, *United States v. Moore*, 95 U.S. 760, 24 L.Ed. 588. Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction requires that intention must be deduced from the whole statute and every part of it, *Rice v. Minnesota and N. W. R. Co.*, 66 U.S. 358, 1 Black 358, 17 L.Ed. 147. Further an ambiguous statute calls for resort to every source of interpretative assistance. *Santa Monica Mountain Park Co. v. United States*, 99 F.2d 450, affirming 20 F.Supp. 209, cert. granted 306 U.S. 624, 50 S.Ct. 583, 83 L.Ed. 1029, cert. dismissed 306 U.S. 666, 59 S.Ct. 647, 83 L.Ed. 1062.

The intent of Congress with respect to Section 6(m) of the Act is made clear by examining the predecessor statute, the Act of November 13, 1942, 56 Stats. 1018, which reads as follows:

> "No individual who has been convicted of any crime which may not be punishable by death or by imprisonment for a term exceeding a year shall by reason

solely of such conviction be relieved from liability for training and service under this act."

House Report 2574, 77th Congress, 2d Session contains the following remarks by Mr. May of the Committee on Military Affairs:

"The committee wrote into the bill another section by way of amendment. I am sure every Member present knows of the practice and the rule in the War Department for some time that they would not induct into the service a man who had been convicted of a felony. That practice had gone even to the extent of not inducting men who had been convicted of misdemeanors; for instance, a man might be convicted under some provision of the national prohibition law, might be convicted of a breach of the peace, but such court conviction barred him from admission to the service. We have provided that no individual shall be relieved from liability for training and service under this act or held to be not acceptable to the land or naval forces for such training and service on the grounds of his having been convicted of any crime which is not a felony at common law if the local board determines that such individual notwithstanding such conviction is morally fit for service."

In response to a question as to whether it was the intent of the bill to give those persons a chance to fight if qualified, Mr. May stated as follows:

"That is the intent of the committee and I may say that I have been of the opinion that sometimes a fellow who has maybe shot and wounded a man under the heat of passion or in sudden affray, and although convicted, would make a good soldier. (Congressional Record, October 17, 1942, p. 8275)."

The present section, although worded slightly differ-

ently, is sufficiently close to the statute of 1942 to make it pertinent to our inquiry.

We conclude that Section 6(m) of the Act, [50 USCA, App. Sec. 456(m)] is not a direction on the part of Congress to exempt from training and service those persons convicted of felonies, but on the contrary is an injunction not to defer from training and service those persons who have been convicted of misdemeanors. Where there has been a conviction of a felony, the exemption is permissible but is not required. The IV-F classification permissible for a registrant is not created for his benefit, it is created for the benefit of the armed forces. The military agencies are entrusted with the task of selecting personnel to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him. They may however, waive the disability and in such instance he may be inducted into the armed forces or assigned to work of national importance.

We think the meaning of the statute clear, and that Sec. 1622.44 of the Regulations is proper, and not, as contended by appellant, in conflict with Sec. 6(m) and ultra vires.

Appellant argues that since the registrant should have been placed in Class IV-F, there was no basis in fact (*Dickinson v. United States*, 346 U.S. 389) for his classification in I-O. There existed no mandate or direction requiring appellant to be placed in Class IV-F. There is ample basis in fact to sustain the I-O classification.

Our problem has been considered in a cursory manner in three other cases. *Doty v. United States* [8 Cir. 1955] 218 F. 2d 93, at 95, rejects a similar contention in one paragraph. *United States v. Palmer* [3 Cir. 1955] 223 F.2d 893 at 895, similarly rejects a like contention. See, *United States v. Bouziden* [D.C.Okla. 1952] 108 F.Supp. 395 at 397.

The judgment is AFFIRMED.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT LEE KORTE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,673

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed) Judgment
Filed and entered October 13, 1958.

COPY

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FILED
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JAMES R. BROWNING, Clerk

No. 457

In the Supreme Court of the United States

October Term, 1958

ROBERT LEE KORTE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1958

No. 497

ROBERT LEE KORTE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 15-22) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. The petition for a writ of certiorari was filed on November 6, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was exempt from future military service because of a prior felony conviction for violating the Universal Military Training and Service Act.

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, as amended, provides:

Section 6(m) (50 U.S.C. App. 456 (m)):

> No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.

Section 10(b)(7) (50 U.S.C. App. 460 (b)(7)):

> (b) The President is authorized—
>
> * * * *
>
> (7) to prescribe eligibility, rules, and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title, of any person convicted of a violation of any of the provisions of this title;

Section 12(a) (50 U.S.C. App. 462(a)):

> (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations

made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of

not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. * * *.

Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.14):

> Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.44):

> Class IV-F: *Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by

> discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1, par. 10d(1):

> A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department * * *.

STATEMENT

In the United States District Court for the Northern District of California, petitioner was convicted by the court without a jury of a violation of the Universal Military Training and Service Act in that he failed to report for work of national importance. He was sentenced to nine months imprisonment (R. 3-7, 60). His conviction was affirmed on appeal (Pet. App. 15-22).

Petitioner's defense at the trial was that he should have been classified IV-F, unacceptable for service, because of his previous felony conviction for an earlier violation of the Universal Military Training and Service Act.

Petitioner had been classified in January 1952 (R. 11). In the form for persons claiming to be conscientious objectors, and in a subsequent personal interview (May 5, 1952), petitioner stated that he was a member of the Reserve Officers Training Corps, University of California, that he was ordained as a Jehovah Witness minister on May 4, 1952, that he had belonged to Jehovah's Witnesses about a year and that he was employed as a full time clerk at the Western Pacific Railroad, preaching only on Sundays (R. 12-13, 53). Petitioner was retained in Class I-A and ordered to report for induction on April 28, 1953 (R. 14). He refused to submit to induction, was convicted of a violation of the Universal Military Training and Service Act (R. 14-15, 40), and was sentenced to 18 months imprisonment (R. 15, 40).

In March, 1954, petitioner was released on parole after serving eight months of the 18-month sentence (R. 15, 40). He remained on parole until February, 1955, during which time he was classified IV-F (R. 15).

Thereafter, he was re-classified I-A (R. 16). A few days later he filed a conscientious objector form and additional letters and documents showing his ministerial activity (R. 16-19). After the local board retained petitioner in Class I-A, he appealed to the appeal board (R. 21), and the case was referred to the Department of Justice for a hearing (R. 21).

While his case was pending before the appeal board, petitioner was ordered to take a physical ex-

amination at which he was found acceptable. On November 21, 1955, the United States Army Induction Station requested the Adjutant General to determine petitioner's eligibility for induction in view of his criminal record. On December 14, 1955, the Induction Station Commander executed a certificate of acceptability certifying that petitioner was found fully acceptable (R. 21, 37-38, 46).

On February 29, 1956, the Department of Justice recommended to the appeal board that the petitioner be classified as a conscientious objector (R. 26). He was so classified on July 20, 1956. After he had refused to designate the type of civilian work he would prefer, he was ordered to report for assignment to the Los Angeles Department of Charities (R. 29-34). He failed to report to the local board or to Los Angeles and the present indictment followed (R. 34).

ARGUMENT

Section 6(m) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 456(m)) provides:

> No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.

Petitioner contends that because of his previous conviction of a violation of the Universal Military

Training and Service Act this section exempted him from "training and service," and that he was, as a matter of law, entitled to a IV-F classification (Pet. 9-14). From this premise he argues that, to the extent the regulations permit waiver of unacceptability and hence classification for induction or civilian service, they are unauthorized by statute.

Section 6(m) of the Act (50 U.S.C. App. Sec. 456(m)) does not, however, require that all persons convicted of a felony be relieved from military service. This section is merely permissive:—unless the prior conviction is for a felony the person cannot be relieved of service; if the prior conviction is for a felony the section does not provide that he *must* be relieved from service.

All the classes of citizens entitled to exemption from military service are set forth clearly, precisely and affirmatively in Section 6 and its various subsections. The status of a felon is mentioned in only one subsection, "m", where it is stated in the negative fashion set forth above. The history of the Universal Military Training and Service Act makes it clear that the thrust of this particular section was not to grant an exemption but to insure that persons convicted of minor criminal offenses (breach of the peace, *etc.*) would not be immune from military service. The predecessor statute, the Act of November 13, 1942, Section 4, 56 Stat. 1018, which added subsection j to Section 5 of the Selective Training and Service Act of 1940, read:

> (j) No individual who has been convicted of any crime which may not be punished by death or

> by imprisonment for a term exceeding one year shall, by reason solely of such conviction, be relieved from liability for training and service under this Act.

House Report No. 2574, 77th Congress, 2d Session, shows that the purpose of this section was to tap a source of manpower that had previously been kept closed. In the debates, Mr. May of the Committee on Military Affairs stated (Congressional Record, October 17, 1942, p. 8275):

> The committee wrote into the bill another section by way of amendment. I am sure every Member present knows of the practice and the rule in the War Department for some time that they would not induct into the service a man who had been convicted of a felony. That practice had gone even to the extent of not inducting men who had been convicted of misdemeanors; for instance, a man might be convicted under some provision of the national prohibition law, might be convicted of a breach of the peace, but such court conviction barred him from admission to the service. We have provided that no individual shall be relieved from liability for training and service under this act or held to be not acceptable to the land or naval forces for such training and service on the ground of his having been convicted of any crime which is not a felony at common law if the local board having jurisdiction determines that such individual notwithstanding such conviction is morally fit for service.

Although the wording of the present section is slightly different, the intent is the same, to make

certain that there shall be no exemption solely because of conviction of a minor offense. It does not mean that one convicted of a felony must be exempt.

The position that Section 6(m) permits but does not require exemption of a person convicted of a felony is strengthened by other sections of the Act. Section 10(b)(7) (50 U.S.C. App. Sec. 460(b)(7)) (*supra*, p. 2) authorizes the President to "prescribe eligibility, rules and regulations governing the parole for service in the armed forces, or for any other special service established pursuant to this title of any person convicted of a violation of any of the provisions of this title." A conviction for any of the provisions of the Act constitutes a felony (50 U.S.C. App. Sec. 462(a)). Therefore, if petitioner's contention that Section 6(m) is a mandatory exemption for felons is accepted, Section 10(b)(7) is in direct conflict with it because it authorizes the President to determine the eligibility for service of a felon. Certainly Congress intended that construction of the two sections that would permit both of them to stand. *United States* v. *Moore*, 95 U.S. 760. The only reasonable and logical answer is that Section 6(m) does not demand that all felons be exempt.

This problem has been considered without extended discussion by the United States Court of Appeals for the Eighth Circuit in *Doty* v. *United States*, 218 F. 2d 93. There the court rejected a convicted felon's contention that he was ineligible for military service because of such conviction, stating that Section 6(m) of the Act did not make the defendant ineligible for service and that his acceptance or re-

jection rested in the discretion of the draft board or the military authorities. See also *United States* v. *Bouziden*, 108 F. Supp. 395 (W.D. Okla.).

Pursuant to the President's express power to "delegate any authority vested in him" under the Act and to "provide for the subdelegation of any such authority" (Section 10(c) of the Act, 50 U.S.C. App. Sec. 460(c)), pertinent Selective Service Regulations and Department of the Army Special Regulations were promulgated. Paragraph 10d(1) of the Army Regulations states:

> A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department. * * *

In the instant case this waiver was granted and petitioner was given a I-O classification (conscientious objector).

Section 1622.44 of the Selective Service Regulations (32 C.F.R. (1954 Rev.) Sec. 1622.44) stated that:

> In Class IV-F shall be placed any registrant * * * (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for

classification into a class available for service

* * *

Thus, under this section a man convicted of a felony who has been granted a waiver of moral disqualification is to be classified as other registrants. Like others, only if he does not qualify for military service, for noncombatant military service, or for service as a civilian worker, is he placed in the IV-F classification.

It is apparent then that the appeal board did not, as petitioner contends, improperly fail to consider the IV-F classification. On the contrary, it followed the dictates of Section 1622.44 and placed petitioner in a class where his services might be utilized for civilian work contributing to the maintenance of the national health, safety, or interest (Selective Service Regulations, Section 1622.44).

CONCLUSION

The decision below is clearly correct, there is no conflict among the circuits and no occasion for further review by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

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